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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 365

MICHAEL C. SANSONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 19–34) has not yet been officially reported.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 1964. (Pet. 34–35.) The petition for a writ of certiorari was filed on August 10, 1964. This Court's jurisdiction is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether petitioner was entitled to an instruction permitting the jury to find him guilty of violating § 7207 of the Internal Revenue Code of 1954 as a

lesser included offense in this prosecution for violating § 7201 of the 1954 Code.

2. Whether petitioner was entitled to an instruction permitting the jury to find him guilty of violating § 7203 of the 1954 Code as a lesser included offense in this prosecution for violating § 7201 of the 1954 Code.

3. Whether the government sufficiently corroborated the affidavit given by petitioner to the investigating agents.

STATUTES AND RULE INVOLVED

Internal Revenue Code of 1954:

> SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX.
>
> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.
> (26 U.S.C. 1958 ed., Sec. 7201.)
>
> SEC. 7203. WILLFUL FAILURE TO FILE RETURN, SUPPLY INFORMATION, OR PAY TAX.
>
> Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at

the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

(26 U.S.C. 1958 ed., Sec. 7203.)

SEC. 7207. FRAUDULENT RETURNS, STATEMENTS, OR OTHER DOCUMENTS.

Any person who willfully delivers or discloses to the Secretary or his delegate any list, return, account, statement, or other document, known by him to be fraudulent or to be false as to any material matter, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both.

(26 U.S.C. 1958 ed., Sec. 7207.)

Federal Rules of Criminal Procedure:

Rule 31.

VERDICT

* * * * * *

(c) *Conviction of Less Offense.* The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

* * * * *

STATEMENT

On January 30, 1963, a two-count indictment was returned in the Eastern District of Missouri charging

petitioner, Michael C. Sansone, with wilfully attempting to evade and defeat a portion of his and his wife's income taxes for 1956 and 1957 by filing false and fraudulent returns, in violation of § 7201 of the Internal Revenue Code of 1954. (R. Vol. 1, pp. 1–2.)[1] The first count charged petitioner with understating their taxable income of $5,012.59 for 1956, thereby wilfully attempting to evade and defeat $1,052.78 in income taxes for that year. The second count charged him with understating their taxable income of $10,144.89 for 1957, thereby wilfully attempting to evade and defeat $2,456.48 in income taxes for that year.

The jury found petitioner not guilty on Count One of the indictment, and guilty on Count Two. (R. Vol. 2, p. 317.) The court sentenced him to fifteen months imprisonment, and fined him $2,000. (R. Vol. 2, p. 321.)

Petitioner presently lives in Phoenix, Arizona, where he is engaged in running a small real estate office. (R. Vol. 2, p. 179.) During the indictment years he lived in St. Louis, Missouri, and worked as a salesman of stocks, bonds and real estate. (R. Vol. 2, pp. 182, 183, 209–210.) He held a real estate salesman's license from the State of Missouri during this time. (R. Vol. 2, p. 208.) On December 6, 1955, petitioner took an option to purchase a certain piece of land. (R. Vol. 2, p. 16.) He subsequently exercised that option and signed a contract to buy the property for $22,500. (R. Vol. 2, pp. 16–17.) On the

[1] "R." references are to the record certified to this Court, which record consists of four volumes.

same day that petitioner acquired the land, March 19, 1956, he sold a portion of it to D–X Sunray Oil Company for $20,000. (Pet. 20; R. Vol. 2, pp. 31–32.) On August 12, 1957, he sold another portion to Tremarco Corporation for $27,000. (Pet. 21; R. Vol. 2, p. 28.)

These transactions resulted in a short-term capital gain of $5,012.59 in 1956, and a long-term capital gain of $20,692.34 in 1957. (R. Vol. 2, pp. 60–67.) Petitioner did not report these capital gains in his 1956 and 1957 income tax returns, and they were not shown on the worksheets which he gave his brother-in-law to use in preparing their returns. (R. Vol. 2, pp. 40, 42–44, 64, 69.) Petitioner did report capital gains from stock transactions in 1956, and he admitted at the trial that he was familiar with reporting capital gains at that time. (R. Vol. 2, pp. 64, 208.) On May 5, 1960, petitioner signed an essentially exculpatory affidavit, in which, however, he admitted that he knew he should have reported the 1957 sale. (R. Vol. 2, pp. 104–107.)

ARGUMENT

1. The trial court was correct in refusing to instruct the jury that petitioner could be found guilty of the lesser included offense of wilfully filing a tax return which he knew to be false or fraudulent as to a material matter (R. Vol. 2, p. 316; R. Vol. 3, pp. 3–4). The court of appeals sustained this ruling (Pet. 33) on the ground that § 7207 of the 1954 Code does not apply to income tax returns. *Achilli* v. *United States*, 353 U.S. 373; *Janko* v. *United States*, 281 F. 2d 156, 164–167 (C.A. 8th), reversed on other

grounds, 366 U.S. 716; *Redfield* v. *United States*, 315 F. 2d 76, 82 (C.A. 9th). There is no occasion for this Court to consider this broader ground, for it is clear that, even if § 7207 did apply to income tax returns, a violation of that section would not be a lesser included offense vis-a-vis § 7201.[2]

Rule 31(c) of the Federal Rules of Criminal Procedure (*supra*, p. 3) is applicable in circumstances where Congress "has defined two distinct offenses, but one offense requires proof of all the facts or elements necessary to establish the other, plus something more—in other words, a greater offense including a lesser". *Ekberg* v. *United States*, 167 F. 2d 380, 385 (C.A. 1st). The rule states that a lesser included offense instruction is required where there exists a gradation of offenses, in which the lesser offense is "necessarily included in the offense charged". The greater offense must contain the same elements plus some aggravating ingredient not found in the lesser included offense, and the evidence must permit the jury to find the defendant not guilty of the greater offense but guilty of the lesser. See 1 Wharton, *Criminal Law* (12th ed., 1932), Section 33. Cf. *Dynes* v. *Hoover*, 20 How. 65, 79–80; *Sparf and Hansen* v. *United States*, 156 U.S. 51, 63.

[2] In the *Achilli* case the Government indicated to this Court that it would institute no new prosecutions under § 3616(a) of the 1939 Code, the predecessor to Section 7207 of the 1954 Code. Memorandum for the United States filed in No. 834, October Term, 1956, p. 14, fn. 22; brief for the United States filed in Nos. 430 and 834, October Term, 1956, p. 14. In the intervening seven years the Department of Justice has not authorized a single prosecution under either section.

Although filing a false and fraudulent return is probably the most common method of violating § 7201 of the 1954 Code, it is certainly not the only one. For example, a taxpayer may file no return at all, and engage in such wilful conduct to conceal his tax liability that he may be convicted of a wilful attempt to evade his taxes. *Spies* v. *United States,* 317 U.S. 492, 497–499; *United States* v. *Kafes,* 214 F. 2d 887, 890 (C.A. 3d), certiorari denied, 348 U.S. 887. From this it is manifest that a violation of § 7207 is not "necessarily included" in a violation of § 7201; hence no instruction was required.

2. Nor did the trial court err in refusing to give a lesser-included-offense instruction as to § 7203. (R. Vol. 2, p. 316; R. Vol. 3, pp. 1–2.) The offenses proscribed by § 7203 are separate and distinct from those condemned by § 7201, each involving elements of proof not involved in the other.

As this Court pointed out in *Spies* v. *United States,* 317 U.S. 492, 499, the felony (§ 7201) involves "some willful commission" in contrast with the "willful omissions that make up the list of misdemeanors". The Third Circuit adverted to the separate nature of the two offenses in a case in which the taxpayer had been convicted of violation of *both* subsections (a) and (b) of § 145 of the 1939 Code—the predecessors of the present § § 7203 and 7201, respectively—*for the same year.* *United States* v. *Kafes,* 214 F. 2d 887 (C.A. 3d), certiorari denied, 348 U.S. 887. If a taxpayer is guilty of an act of *commission, e.g.,* filing a false return in a wilful attempt to evade his taxes, he is guilty under § 7201 although he has not violated § 7203. By

the same token, it is clear that a taxpayer could be guilty of all the acts of omission proscribed by § 7203 without having committed any affirmative act of evasion required to make out the felony. *Spies* v. *United States, supra,* pp. 498–499.

Moreover, the evidence in this case would not support petitioner's conviction under § 7203. There is no evidence here that petitioner had simply omitted to file a return, pay the tax due, or supply information. What this record shows is a "willful commission"—the filing of a fraudulent return containing false information and the payment of a part of the tax with the representation that no more was due.[8] No instruction should be given on a lesser offense where there is no evidence to justify it. *Davis* v. *United States,* 165 U.S. 373, 378–379; *Sparf and Hansen* v. *United States,* 156 U.S. 51, 63; *Chaifetz* v. *United States,* 288 F. 2d 133, 136 (C.A.D.C.), reversed on one count, 366 U.S. 209.

3. Petitioner imputes to the court below a holding that, since petitioner's affidavit (or "admission") was corroborated by independent evidence of failure to report income, there was no need for corroborating

[8] We fail to see how petitioner may try to rely (Pet. 10) upon a portion of his affidavit in support of his argument on this point, for at the trial he expressly denied (R. Vol. 2, pp. 200–201) having made these statements. Moreover, this statement does not support the instant contention, for it merely denies petitioner's intention to wilfully attempt to evade *payment* of his proper taxes. A wilful attempt to evade of a tax is a separate and different violation of Section 7201 from that which petitioner was charged, *viz.*, a wilful attempt to evade and defeat a tax. *Cohen* v. *United States,* 297 F. 2d 760, 769–770 (C.A. 9th), certiorari denied, 369 U.S. 865.

evidence as to that part of the affidavit which went to the issue of intent (*i.e.*, the statement that "I knew that I should have reported the 1957 sale.") It is plain, however, that the court below held no such thing. On the contrary, it explicitly, and correctly, ruled (Pet. 29) that "there is independent evidence in this record 'to corroborate and make trustworthy the appellant's admissions as to his *intent* with respect to his 1957 return' and that such independent evidence is 'truly substantial.'" (Emphasis added.) After listing twelve items of corroboration, the court concluded (Pet. 30):

> All this in the aggregate constitutes, in our view, independent evidence of sufficiently substantial character, which in the language of *Opper,* tends "to establish the trustworthiness of the statement" in the Sansone affidavit. It "supports the essential facts admitted sufficiently to justify a jury inference of their truth." And it serves to fulfill the requirement of Smith that *"All* elements of the offense must be established by independent evidence or corroborated admissions." [Emphasis added.]

We submit that the items enumerated by the court below constituted substantial independent corroboration of petitioner's admission of intent, that the court of appeals correctly so regarded them, and that the legal test it applied to this issue in no way differs from that applied by other courts of appeals.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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